WP(C) 3117/1999
BEFORE
HON'BLE MRS. JUSTICE ANIMA HAZARIKA
JUDGMENT AND ORDER

This Court invoking power under certiorari jurisdiction, dismissed the writ petition being WP(C) No.3117/1999 filed by the Management M/s Kellyden Tea Estate on 27.09.2006, holding that the proviso to Section 33(2)(b) of the Industrial Disputes Act, 1947 (in short 'Act') has not been complied with which is a mandatory provision while seeking the approval of the order of dismissal from the learned Labour Court thereby affirmed the judgment and order of the learned Court dated 01.06.1999 passed in Case No. 2 of 1997. The order dated 27.9.2006 has been assailed before the writ appellate court whereby and whereunder the writ appellate court set aside the order dated 27.09.2006 remitting the matter back to answer all the questions raised in the pleadings which is now taken up for disposal.

2. Heard Mr. SN Sharma, learned Senior counsel assisted by Mr. A Yahid, learned counsel for the petitioner. Also heard Ms. D Bora, learned State counsel appearing for respondent No.1 and Mr. A Dasgupta, learned counsel assisted by Mr. S Das, learned counsel appearing for respondent No.2.

3. Appearing for the petitioner, Mr. Sharma, learned Senior counsel has assailed the order dated 1.6.1999 passed by the learned Labour Court on the pleadings set forth viz,.

a. The learned Labour Court has made out a new case which is neither pleaded by the management nor the workman while holding that the management has prevented the workman from attending his job by way of involving him in the criminal case without taking into consideration the discharge note of the hospital, including the evidence of the workman which would go to show that the workman was neither in jail nor in hospital and as such the findings arrived at by the learned Labour Court is total non-application of mind requiring interference under certiorari jurisdiction.

b. The learned Labour Court has committed an error apparent on the face of the record in holding that the management did not take any steps to serve the notices upon the workman while he himself refused to accept the notices, meaning thereby that the workman knew the contents of the letter even though he was absenting willfully without permission or leave which has been pleaded by the workman in his written statement that he approached the management for allowing him to rejoin in the month of June 1997 even after coming out of bail, that too, after about 6 months of absence without any leave or permission which amounts to non-consideration of this vital aspect of the pleadings thereby vitiates the impugned order under challenge.

c. The registered letters sent to the workman on which the postal department put a note, either not found or refuses to accept . Without considering these registered letters and attendance register exhibited before the learned Labour Court, the learned court brushed aside those materials on record in holding that non-examination of postal peon is fatal to the case of the management based on the oral evidence of the workman but not on records exhibited by the management which is apparent on the face of record wherefor the impugned order requires interference.

d. The service condition of the workman is regulated by the certified Standing Orders and under the certified Standing Orders, habitual absenteeism is a gross misconduct for which the management has to proceed in accordance with the provisions of Standing Orders but the learned court has committed a wrong in holding that the absence from duty and the punishment of dismissal is too harsh and the management could have avoided the proceedings under Section 33(2) of the Act which is erroneous, thus deserves to be interfered with.

e. The learned Labour Court has failed to consider the evidence adduced by the management including the records exhibited to prove the case of habitua

l absenteeism on the part of the workman which vitiates the entire impugned o rder rendering the same liable to be set aside.

f. A proceeding under Section 33 of the Act is not an industrial adjudic ation and Section 11-A of the Act would not be available, rather the court has t o see as to whether the management has complied with the proviso to section or not and whether the management has established a prima facie case or not requ iring approval of the action taken by the management wherefor the leaned court is not aware of the legal provisions of the Act when the learned Labour Court came to a finding that for absenteeism, the punishment for dismissal is too ha rsh and the management could have avoided the proceeding under Section 33(2) by imposing a punishment other than dismissal and the findings so arrived at is pe rverse and the same is liable to be set aside.

g. The provisions under Section 33 of the Act puts only a bond on the manag ement so that during pendency of a reference, no workman is victimized for pendi ng reference and therefore, an application under Section 33 is not an industri al adjudication like that of a reference made under Section 10 of the Act and therefore the court has not been empowered to substitute the punishment under S ection 33(2)(b) of the Act whereof the learned court acted beyond its jurisdicti on by substituting the punishment including the order of re-instatement imposing cost and as such the same is liable to be set aside and quashed.

h. The learned Labour Court has exceeded its jurisdiction in not according approval of the dismissal order of the workman which is not based on legal evide nce and documents exhibited by the management and the same cannot stand scrutiny of law, more so, the reasoning given are not in accordance with law and as such the impugned order of refusal to grant approval is entirely illegal and without jurisdiction which require interference in exercise of power under certiorari j urisdiction.

4. In the context of the pleadings set forth hereinabove, Mr. Sharma, learn ed Senior counsel would contend that the workman has admittedly remained absen t from his duties with effect from 16.10.1996 wherefor on 19.10.1996 and 25.10. 1996 show cause notices were issued to him in his garden’s address for remainin g absent. Thereafter the management had to issue warning letters asking the work man to resume his duties on 29.10.1996, 31.10.1996, 05.11.1996, 08.11.1996, 10.1 1.1996, 15.11.1996 and 19.11.1996, which, however, could not be served upon the workman as he was not found in his quarter and consequently thereupon charge sheet was issued for unauthorised absence but the same again could not be serve d upon him and accordingly on 17.12.1996 the charge sheet was forwarded by regi stered post to his garden address.

5. Mr. Sharma, learned Senior counsel referring to the pleadings would cont end that thereafter as no reply was received from the workman, the management de cided to hold inquiry into the charges by letter dated 04.01.1997. The said lett er was issued to the workman as well as it was hung in the notice board. The enq uiry was held ex-parte on 06.01.1997 wherein 4 (four) witnesses were examined an d attendance registers were exhibited and the enquiry officer gave his findin gs holding the charges being proved and forwarded his findings to the managemen t for doing the needful. The management on receipt of the enquiry report sent th e findings of the enquiry to the workman on 23.01.1997 asking him to submit his representation, if any. Thereafter the management issued a fresh letter on 07.0 2.1997 giving the workman a fresh opportunity to submit his representation or to appear in person before the management which of course did not yield any resul t and in view of such a situation, the management on 14.03.1997 dismissed the w orkman from service who was a permanent employee of the garden and filed an app lication under Section 33(2)(b) of the Act for approval of the action taken by t he management before the learned Labour Court whereon the learned court registe red a case being Case No. 2 of 1997.

6. In the proceedings before the learned Labour Court, the workman took the plea that he was in hospital wherefrom he was discharged on 05.07.1996. Thereaf

ter, he was arrested on 17.10.1996 by police. He was released on bail on 25/26.12.1996 and if the contentions of the workman is believed then also the notice of enquiry dated 04.01.1997, the domestic enquiry which was held on 06.01.1997, the forwarding letter of the findings of the enquiry officer dated 23.01.1997 as well as letter dated 07.02.1997 and the dismissal order dated 14.03.1997 were issued to the workman when he was not in jail and admittedly during this period he was absent from his duties and the workman's own case is that he had approached the management after 16.10.1996 to allow him to join in his duty for the first time on 28.06.1997 which would reveal that from December 1996 to June 1997 he remained absent unauthorisedly and the management apart from adducing evidence exhibited the attendance register to show that the workman was absent continuously and registered letter vide Exhibits- 21, 22, 23 and 24, were returned/refused by the workman indicates that the dismissal order requires approval by the learned court, contended Mr. Sharma. However, the learned Labour Court did not accord approval to the order of dismissal of the workman holding that the management has failed to examine the postal peon. On this point the learned Senior counsel referred the decision of the Apex Court reported in (2000) 1 LLJ 1630 (Syndicate Bank -vs- GSSB Staff Association) wherein the Apex Court in paragraph 15 of the judgment held that when a notice is sent on correct address which was returned with the endorsement refused , then a clear presumption arose that the addressee is aware about the contents of the notice and in such case postman is not required to be examined and on this ground alone the interference is required holding that the learned court has committed an error apparent on the face of the record in not according approval of the order of dismissal, contended by Mr. Sharma.

7. Mr. Sharma would further contend that the learned Labour Court has committed an error apparent on the face of the record in holding that the award of dismissal for remaining absent is too heavy a punishment and the management could have avoided such situation by passing lesser punishment other than dismissal thereby the management has taken the risk of their action being disapproved, whereas it is settled position of law that in an application under Section 33(2)(b) of the Act, the court cannot substitute the quantum of punishment awarded by the management and section 11-A of the Act has no application in an application under Section 33(2)(b) of the Act, more so, when it is a settled position of law that approval of dismissal under Section 33(2)(b) is not an industrial adjudication and even after granting approval under Section 33(2)(b), the workman is at liberty to raise an industrial dispute and get the dispute referred under Section 10 of the Act, contended by the learned Senior counsel. Mr. Sharma further submitted that the findings of the learned court dated 01.06.1999 in case No. 2 of 1997 requires to be interfered with under certiorari jurisdiction.

8. In support of his contentions, Mr. Sharma has placed reliance on the following decisions: -

1. (2009) 4 LLJ 558 Gau (Md. Adul Rahim -vs- Management of Cachar Paper Mil l, HPC Ltd., Assam)
2. (2005) 4 GLT 635 (Indian Oil Corporation Ltd -vs- Presiding Officer & Ors.),
3. AIR 1978 SC 1004 (Lalla Ram -vs- Management of DCM, Chemical Works Ltd.)
4. AIR 1957 SC 326, (Caltex (India) Ltd. -vs- E. Fernandes and another)
5. AIR 1959 SC 923 (Sasa Musa Sugar Works Pvt. Ltd. -vs- Shobrati Khan),
6. (2006) 1 SCC 589 (State of Rajasthan and another -vs- Mohd. Ayub Naz)

9. On the contrary, Mr. Dasgupta, learned counsel appearing for the respondent workman would contend that the order of dismissal dated 14.03.1997 mentioning therein about the aforesaid payment was not served on the workman and the requirement of the proviso to Section 33(2)(b) of the Act was not satisfied which is not the basis on which the conclusion of the court in the writ proceeding has been recorded as held by the writ appellate court. The writ appellate court has further noticed that whether notices of the enquiry as well as the dismissal

order were served on the workman or not is an issue that is inextricably linked with the other issues arising in the writ petition which was not gone into by the Single Judge and therefore, left open to be determined by the Single Judge or else it would be prejudging the issues before the Single Judge which were declined to be gone into.

10. Before dealing with the questions raised by the contesting parties after remand, it is noticed that in the earlier writ proceeding the record of Case No. 2 of 1997 was called for vide office note dated 19.08.1999 from the learned Labour Court, Guwahati but the same has not been received by the office of this Court. It is also noticed that no affidavit-in-opposition has been filed by the respondent No.2, workman in the writ proceeding. The record has also not been produced by the management petitioner for perusal of the Court wherefor the contesting parties submitted that the case may be heard on the basis of the pleadings made in the writ petition and the annexeures appended thereto and accordingly, the case was heard and disposed of. However, after the remand the record of Case No. 2 of 1997 was called for which is now available before the Court.

11. After receipt of the record from the Labour Court, the Court took up the matter for hearing. The record would reveal that after dismissal of the workman from service, the management has filed an application under Section 33(2)(b) of the Act before the Labour Court which was registered and numbered as Case No. 2 of 1997. The learned Labour Court issued notices to both the parties asking them to appear before the court. In pursuance to the notice, the workman entered appearance through his counsel by filing written statement. In his written statement, the workman categorically stated that he had not received any charge sheet, notice of enquiry and dismissal letter. He has further submitted that his long absence was due to hospitalization and jail custody.

12. Thereafter, the management in order to substantiate their action has examined 2(two) witnesses before the Labour Court to prove the enquiry, requiring approval of the dismissal order. The management also has exhibited all the notices, the enquiry proceeding and its report, the attendance register and the letters which were refused and returned back to the management by the postal department, whereas the workman in support of his case, has exhibited the discharge note of the Garden Hospital vide Ext A which would go to show that he was discharged from the Hospital on 06.10.1996. The workman has also produced the forwarding report by police which shows that he was arrested on 17.10.1996 under Sections 447/376/323 IPC and that he was in police custody for 67 days. The management was informed about the hospitalization and jail custody. After coming out of the jail, he prayed for permission to join in his duties vide letter dated 28.6.1997. The workman came to know about his dismissal from the notice of the Labour Court.

13. Thereafter, on the basis of the materials on record including the evidence led by the parties and after hearing the parties the learned Labour Court did not accord approval to the application filed by the Management under Section 33(2)(b) of the Act on the basis of the following evidence led by the parties: -

a. Shri Sikand was appointed as enquiry officer who has deposed that the notice of enquiry was issued by the Senior Manager of the Tea Estate. He held the enquiry on 06.01.1997. The workman did not appear. He did not send any information. He waited for an hour. Then he proceeded with the enquiry. He recorded the statements of 4 (four) witnesses on behalf of the management. He verified the attendance register and found that the workman was really absent. He submitted his report marked as Ext-3.

In cross-examination, he has stated that he is not an employee of Kellyden T.E. but of Tata Tea Co. At the relevant time, he was Asstt. Manager of Tata Tea. He did not issue any separate notice from his side. He is not aware whether the notice issued by the manager was received by the workman;

b. Shri Rup Gohain has examined himself as PW 2 before the learned Labour Court who has deposed that he has been working in Kellyden T.E. as Deputy General Manager since June 1995. He knows Ananta Tanti. Ext-4 is the Attendance Register from 13.10.1996. Exts 5, 6 and 7 are also Attendance Resisters. He has proved the signatures of the sender of the notices including charge sheet. Ext 18 was sent forwarding the domestic enquiry report and final report informing the workman that an enquiry was held on 6.1.1997. This was hung on the notice board as it could not be served personally. The workman was dismissed vide letter dated 14.03.1997. He has further stated that as there was a case pending before the Assitant Labour Commissioner and the Conciliation Officer, Govt. of Assam, the workman was offered one month's wages and the application was filed as provided under Section 33(2)(b) of the Act. The notices sent by registered post were refused by the workman as had been stated by the postal peon.

In cross-examination, PW 2 stated that the workman's wife is also working as a permanent worker in the same garden. Ext- A is the discharge note issued by the doctor of the Garden Hospital. He heard about the criminal case against the workman. He, however, denied the suggestion that the notices were not sent but false report about them obtained.

14. In the proceeding before the learned Labour Court the workman has deposed that he lives inside the colony. He has two wives and both of them are permanent worker in the garden. He was injured by the relatives of his second wife necessitating hospitalization. Ext-A was issued by the hospital authority on 6.10.1996. He was in hospital for about 20 days. Ext B & C related to the police case. He was treated by the Government doctor and Ext-D is the prescription dated 16.10.1996. He moved the garden authorities to allow him to join after he was cured. The authority refused to allow. He was in police custody for 67 days. Ext F is the certified copies of the order sheet and judgment. Ext E is the certified copy of the FIR. He has never received any notice asking him to join in his duties. He did not receive any notice about the domestic enquiry. No postal peon went to him to deliver any letter. His wife also did not receive any notice. No notice was tendered to his family members. Ext 24 was not refused by him, so also Exts 21, 22 and 23. Ext-H dated 28.6.1997 was submitted by him before the Garden authority praying therein to allow him to join.

15. The learned trial Court on the evidence on record dealt with the matters in two parts. The first part relates to domestic enquiry. The second part relates to establishment of a prima facie case for dismissal requiring approval of the court under Section 33(2)(b) of the Act.

16. In the first part the learned trial Court on the admission of the Management has held that an Industrial dispute was pending requiring approval of the court as required under Section 33(2)(b) of the Act and therefore, the learned court did not take up the preliminary issue relating to domestic inquiry as well, since the management have adduced evidence on merit in addition to its claim on the basis of domestic enquiry. The enquiry officer PW 1 has deposed that he has no personal knowledge about the service of notice and none of the notices preceding the dismissal were served personally on the workman. Similarly PW 2 does not have any knowledge relating to service of notice, whereas the workman in his deposition has denied service of notice and denied to have tender any such notice by the postal peon, thereby refused any tender of notice. Therefore, it was incumbent upon the management to examine the postal peon including the garden chowkidar involved in the notice serving process which the management has failed. Therefore, the learned court has held that a domestic enquiry without the service of notice in an acceptable manner is tainted with the vice of failure to follow the rules of natural justice since the non-availability at home or the refusal to accept the notices by the workman have not been proved in the desired manner even to meet the standard of a tribunal and hence the court was not inclined to hold that the domestic enquiry was fairly conducted.

17. In regard to the second part, the learned Labour Court has given the weightage of the evidence of Shri PC Choudhury, Senior General Manager of Kellyden TE relating to the police case being Kaliabor PS Case No. 59/96, due to which, the workman had been kept out of the job by the authority vide Ext E. Ext D is a prescription dated 16.10.1996 (the date of first absence of the workman) relating to ailments of the workman. Moreover, the trial Court observed that the Kaliabor PS Case No. 56/96 under Sections 447/376 IPC reported on 16.10.1996, i.e. the date of absence of the workman, though the date of occurrence was 18.09.1996 which shows that the Senior General Manager of the garden was the witness No.1 in the FIR. However, in the Sessions Case No.5 (N) 98 arising out of aforesaid Police Station Case, while acquitting the workman (accused) from the charges levelled against him vide judgment dated 20.2.1998 (Ext. F), the learned trial Court held as thus, It is clear that there is not even an iota of incriminating evidence on record implicating the accused & & &. which would go to show that the materials placed is nothing but the involvement of the management in launching the prosecution against the workman whereby the circumstances so created to compel the workman to remain absent in order to enable the authorities to take action against the workman. The learned court has further observed that the explanation given by the workman for his absence cannot be brushed aside, wherein, for absence dismissal was too heavy punishment which amounts to an unfair labour practice as envisaged in the Fifth Schedule 1-5(f)(g) of the Act, whereof the management could have avoided the steps taken under the proviso to Section 33(2) of the Act wherefor the learned trial court invoking the power under section 33(5) of the Act did not approve the order of dismissal thereby setting aside the order of dismissal held that the workman is deemed to have been in service all along and he will get back wages and other service benefits directing the management to allow him to join in his duties forthwith, further making it clear that the workman shall get a cost of Rs.2000/- which has been assailed in the instant writ proceeding.

18. Before dealing with the issues raised before the court on remand by the writ appellate court it would be appropriate to quote the final charge sheet dated 16.12.1996 (vide Annexure-A to the writ petition) which is quoted hereunder: -

Regd with A/D

132/96 16.12.96

Final charge sheet after three warnings.

To

Shri 3 Ananta Tanti
P.F. No. 4433
Water Pump Attendant
Kellyden Factory

You are alleged to have committed the following offence:- from 16.10.96 to 18.10.96 to 30.10.96 and 9.11.96 to 20.11.96 you were found guilty of unauthroised absence from duty for which you had been formally warned thrice. You were warned vide Management's letter dated 29.10.96, dated 8.11.96 and dated 19.11.96. Since the issue of these three warnings you have continued to absent yourself from work without the permission of the management.

The above act of yours, if proved, will constitute habitual absenteeism without leave which is a gross misconduct under the standing orders in force on the estate.

I therefore call upon you to explain by 7.30 AM (IST) on 23.12.96 why disciplinary action should not be taken against you.

In the event of your not submitting any explanation at the appointed time and date it will be presumed that you have no explanation to offer and that you have accepted the charges and the matter can be disposed in a manner deemed appropriate.

The said letter dated 16.12.1996 would amply demonstrate that two line chowkidars went to the resident of the workman wherein there is an endorsement Not found him . There are two signatures of line chowkidar along with the Senior Manager of the Garden.

19. The Ext 1 is a letter dated 04.01.1997 issued by Senior Manager Kellyden TE to the workman which is quoted hereunder for better appreciation of the case : -

Our reference 132/96 04.01.97

To

Shri 3 Ananta Tanti
PF No. 4433
Water Pump Attendant
Kellyden Factory.

Dear Sir,

Further to my letter No. 132/96 dated 16.12.96 you are alleged to have committed the following offence-

From 16.10.96 to 18.10.96 to 30.10.96 and 9.11.96 to 20.11.96 you were found guilty of unauthorised absence from duty for which you have been formally warned thrice. You were warned vide Management's letter dated 29.10.96 dated 8.11.96 and dated 19.11.96, since the issue of these three warnings you have continued to absent yourself from work without the permission of the Management.

The above act of yours, if proved, will constitute habitual absent without leave which is a gross misconduct under the Standing Order in force on the estate.

It has now been decided to hold an enquiry into the charges levelled against you. Therefore you are hereby directed to attend the enquiry at my office on 6.1.97 at 10.00 AM (IST). You should have with you documentary evidence you may wish to tender. The enquiry will be conducted by Mr. R. Sikand, Asstt. Manager, Kellyden TE.

At the enquiry you will be given full opportunity to conduct your defence, and to examine your witnesses and to cross examine the co. witnesses. You should give me the names of those employees, if any, whom you would like to examine as witnesses, so that arrangements can be made for their presence at the enquiry. If you wish to examine as a witness anyone not employed by this estate, you should yourself arrange for their attendance.

Should you fail to attend the enquiry, it will be held in your absence.

Yours faithfully,
Sd/-
Senior manager
Kellyden T.E.

The above has been read out to Shri 3 Ananta Tanti P.F. No. 4433, in a language which he understands and a copy handed over to him for which a receipt has been obtained.

In the next page, it has been written as not found wherein, alongwith the Sr. Manager, two line Chowkidars have put their signatures as witnesses.

20. The communication dated 14.03.1997 (vide Annexure-C to the writ petition ) whereby and whereunder the workman was dismissed, is quoted hereunder for appreciation of the argument advanced by the contesting parties: -

Your Ref.
14.03.97

Our Ref. 132/97

To

Shri 3 Ananta Tanti
PF No. 4433
Water Pump Attendant
Kellyden Factory
Kellyden Tea Estate

Dear Sir,

Further to my chargesheet dated 16.12.96 issued to you an enquiry was held on 6.1.97.

From the proceedings of the enquiry, findings of enquiry officer, I have come to the conclusion that the charges leveled against you have been proved conclusively. An ex parte enquiry has been held in strict conformity with the principles of natural justice. I regret to advise that you have been found guilty of the charges framed against you in the said charge sheet which then proved, warrants your dismissal from the services of the company under the certified Standing Orders.

I have gone through your past records. As there are no extenuating circumstances to take a lenient view in your case, you are hereby dismissed from the services of the company with immediate effect.

You are advised that since proceeding regarding an Industrial Dispute is pending before the Asstt. Labour Commissioner and the Conciliation Offier, Govt. of Assam an application under Section 33(2)(b) of the Industrial Disputes Act is being filed simultaneously for approval of the action taken against you.

One month's wages as required under Section 33(2)(b) of the Industrial Disputes Act and other dues as explained in the attached Statement of dues, may be collected from this office on 28.3.97 at 3.00 PM.

As your services with the company have been terminated, you are requested to vacate the company's quarter No. Kellyden-136, Line No. 1 which you have been occupying as an incident of your employment and to leave this estate before 28.3.97 failing which action will be take to have you evicted. You will no longer be eligible to draw any ration from the Godown and you will henceforth cease to receive any benefits of facilities whatsoever from the company.

Yours faithfully
Sd/Illegible
Senior Manager

21. Thereafter the management has taken recourse to the provisions of Section 33(2)(b) of the Act since an Industrial Dispute pending before the Assistant Labour Commissioner and the Conciliation Officer, Government of Assam which has been admitted in the pleadings of the Management and on the application made under Section 33(2)(b) of the Act the learned Labour Court passed the order dated 01.06.1999 which is under challenge as indicated above.

22. The Management has filed written argument contending inter alia that the workman remained absent from his duties on and from 16.10.1996 wherefor show causes were issued to him on 19.10.1996 and 25.10.1996 in his garden's address. Thereafter, warning letters were issued on 29.10.1996, 31.10.1996, 5.11.1996, 8.11.1996, 10.11.1996, 15.11.1996 and 19.11.1996 to the workman which, however, could not be served upon him personally as he was not found in his quarter. On 16.12.1996 charge sheet was issued for unauthorized absence but the same again could not be served upon him. Accordingly, on 17.12.1996, the charge sheet was forwarded by registered post to his garden address. As no reply was received form the workman, the management held an enquiry into the charges by letter dated 4.1.1997. The aforesaid letter was issued to the workman as well as it was hung in the notice board and consequently thereupon on 6.1.1997 the enquiry was held ex-parte, wherein four witnesses were examined and attendance registers were exhibited. The enquiry officer gave his findings holding that the charges have been proved. Thereafter on 23.1.1997, the findings of enquiry officers was forwarded to the workman asking him to submit his representation, but no reply was received and t

hereafter a fresh opportunity was given by letter dated 7.2.1997 asking him to s ubmit his representation or to appear for personal hearing, which did not yield any result and hence, the order of dismissal from service was passed and filed a n application under Section 33 (2)(b) of the Act for approval of the action take n by the management before the Labour Court.

23. In the written argument, it has further been contended that the workman before the learned Labour Court took the plea that he was in hospital, wherefrom he was discharged on 6.10.1996 and thereafter, he was arrested on 17.10.1996 by police and was in jail. He was released on bail on 25/26 December, 1996 even if the workman's case is accepted to be true, then also it is admitted that the wo rkman approached the management after 16.10.1996 to allow him to join his duty f or first time on 28.6.1997 meaning thereby that he was absent from December 1996 to June 1997 which is unauthorized absence under the Standing Orders of the Com pany.

24. It has also been contended that before the Labour Court the management a part from adducing evidence has exhibited the attendance registers to show that the workman was absent continuously and the registered letters viz. Exhibits 21, 22, 23 and 24 were returned/refused by the workman. Therefore, the learned Labo ur Court's decision that the management ought to have examined the postal peon i s perverse in view of the decisions reported in (2000) 1 LLJ 1630 (Syndicate Ban k -vs- GSSB Staff Association) wherein the Apex Court has held that when a notic e is sent on correct address which was returned with the endorsement refused t hen a presumption arose that the addressee is aware about the contents of notice and in such a case the postman is not required to be examined. The findings of the Labour Court holding that the award of dismissal from service for remaining absent is too heavy a punishment whereby the approval was not accorded is totall y perverse since the Labour Court is not empowered to change the quantum of puni shment awarded by the Management, inasmuch as, Section 11-A of the Act has no ap plication in an application under Section 33(2)(b) of the Act, more so, when the application seeking approval of the action taken by the management do not come within the purview of an adjudication under the Act, which, however, can be rais ed under Section 10 of the Act and hence the findings arrived at by the Labour C ourt requires interference.

25. To answer the points raised in the written argument filed by the managem ent, it would be necessary to go through the pleadings as well as the records of the case. On a perusal of the records it would show that the final charge sheet dated 16.12.1996 was sent through line chowkidar accompanied by another chowkid ar wherein it was written not found him which have been signed by two chowkida rs along with the Senior Manager. The communication dated 4.1.1997 vide Ext-1 di recting the workman to attend the enquiry failing which the enquiry would procee d in his absence. In Ext-1 the contents of the letter dated 4.1.1997 would show that the above has been read out to Shri 3 Ananta Tanti P.F. No.4433, in a lang uage which he understands and a copy handed over to him for which a receipt has been obtained. Whereas in the next page, i.e continuation page, it is written not found . There is also no signature of the workman. But the enquiry proceeded ex-parte and it is an admitted fact that the communication dated 4.1.1997 was n ot served upon the workman and surprisingly the Enquiry Officer started the Minu tes of the enquiry as thus;

After waiting in the enquiry room for one hour Shri Ananta Tanti failed to show up for the enquiry. Hence, proceedings were started, in his absence.

27. Similarly the communication dated 14.3.1997 was not served upon the work man though by the aforesaid communication the workman has been specifically dire cted to accept one month's wages as required under Section 33(2)(b) of the Act a nd to collect other dues as explained in the statement of dues attached therewit h which was to be collected from the office on 28.3.1997 at 3-00 PM, wherein in the subsequent paragraph it has been specifically stated directing the workman t

o leave the estate before 28.3.1997 which amply prove that the action was not bo na fide on the part of the management since the communication dated 14.3.1997 wa s not served upon the workman.

28. Exts. 21, 22, 23 and 24 alongwith the communication dated 17.12.1996 wou ld go to show that the communication dated 16/17.12.1996 has been returned by th e postal peon with an endorsement on 24.12.1996 that the addressee is not in his residence and hence returned. The Ext 21 is dated 18.3.1997, Ext 22 is dated 18 .3.1997 and Ext 23 is dated 18.3.1997 wherein the postal peon has endorsed refu sed, returned to sender on the same date signed by the postal peon on 22.3.1997 . There is no explanation by the management as to which prompted them to issue t hree letters Exts. 21, 22 and 23 on the same day. Ext 24 is dated 29.3.1997 wher ein the postal peon has endorsed on 3.4.1997 with a remark, The person did not accept the letter, returned. The above Exhibits would show that after the dismi ssal order dated 14.3.1997 these communications were made to prove the absenteei sm till 28.6.1997 which was not the final charge dated 16.12.1996. The charge of unauthorized absence relates to the date from 16.10.1996 to 18.10.1996 to 30.10 .1996 and 9.11.1996 to 20.11.1996 whereof the workman was initially in hospital and thereafter he was arrested by police in connection with Koliabor PS Case No. 50/96 under Section 447/376 IPC reported on 16.10.1996 the date of first absence and he was enlarged on bail on 25/26 December 1996. The witnesses adduced by th e management, i.e. PW 1 and PW 2 have sated that they have no personal knowledge about the notices served upon the workman or not though the workman has two wiv es who are permanent worker of the garden and even no notices were issued to the m also which can be termed that the action of the management is not bona fide in the facts and circumstances of the case.

29. In regard to the contentions advances in written argument relating to pr oviso to Section 33(2)(b) of the Act vis- -vis the case reported in AIR 1962 SC 1500, (The Straw Board Manufacturing Co. Ltd. -vs- Govind) and the observation m ade by the writ appellate court, this Court accepts the above proposition of law but in the instant case, the order of dismissal dated 14.3.1997 was not served upon the workman and the Exts 21, 22, 23 and 24 would not help the management wh ich were issued after the dismissal order dated 14.3.1997. There is no dispute w ith regard to the other contentions raised relating to adjudication of Industria l Disputes in a case under Section 33(2)(b) of the Act and that Section 11-A wou ld not be applicable in such a situation. But in a proceedings under Section 33( 2)(b) of the Act, the jurisdiction of the Labour Court is confined to the enquir y as to:-

(i) Whether a proper domestic enquiry has been held as provided under the re levant rules/standing orders;

(ii) Whether a prima facie case for dismissal based on legal evidence adduced before the court is made out;

(iii) Whether the employer has come to a bona fide conclusion that the employe e was guilty and the dismissal did not amount to unfair Labour practice and was not intended to victimize the employee;

(iv) Whether the employer has paid or offered to pay wages for one month to t he employee as required by the proviso.

(v) Whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before whi ch the main industrial dispute is pending for approval of the action taken for d ismissal.

30. On the factual matrix as narrated hereinabove, the learned Labour Court has answered the question Nos.(i), (ii) and (iii) against the management which i s within the limitation under Section 33(2)(b) of the Act and passed the impugn ed order as indicated hereinabove. However, the question of quantum of punishmen t as arrived at by the learned Labour Court is not the correct proposition of la w. But since the question Nos.(i), (ii) and (iii) are answered in the negative, this Court under certiorari jurisdiction do not incline to interfere with the or der dated 1.6.1999 passed by the learned Labour Court holding that there was inf

raction of the principles of natural justice, no prima facie case for dismissal has been made out on the basis of evidence adduced and the action of the managem ent is not bona fide and therefore, the learned Labour Court has rightly rejecte d the approval as sought for by the applicant management under Section 33(2)(b) of the Act.

31. Now we will discuss about the decisions cited by Mr. Sharma in support o f the case of the management/writ petitioner.

32. In the case of Indian Oil Corporation Ltd., 2005 (4) GLT 635 (supra), th is Court has held that Section 33 of the Act contemplates proper permission or a pproval in respect of a disciplinary measure that an employer seeks to impose on the workman. The Court further held that object behind the enactment of Section 33 has always been understood to be ensure that there is no victimization or un fair labour practice and at the same time care must be taken not to render the p rovision of Section 10 of the Act nugatory. There is no dispute about the above proposition of law. What must be taken into account while approving the order of dismissal as to whether there is victimization or unfair labour practice. In th e proceeding before the learned Labour Court in the instant case, the Court was not satisfied with the domestic enquiry and the Court has find out in not so man y words that the action of the management is not bona fide, the principles of na tural justice have been violated and the material on the basis of which the mana gement came to conclusion is not justified, thereby rejected the approval as sou ght for and hence, this Court would not sit as an appellate authority over the d ecision of the learned Labour Court. Thus, the case referred to is not applicabl e to the instant case.

33. In the case of Lalla Ram (AIR 1978 SC 1004) (Supra), the Apex Court has while dealing with the scope of enquiry under Section 33(2)(b) held at para 12 a s follows:

12. The position that emerges from the above quoted decisions of this Court may be stated thus: In proceedings Under Section 33(2)(b) of the Act, the jurisdict ion of the Industrial Tribunal is confined to the enquiry as to (i) whether a pr oper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the empl oyee was guilty and, the dismissal did not amount to unfair labour practice and was not intended to victimize the employee regard being had to the position sett led by the decisions of this Court in Bengal Bhatdee Coal Co, v. Ram Probesh Sin gh MANU/SC/0136/1963 : (1963) ILLJ 291 SC, Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar [1961] 2 LLJ 511, Hind Construction & Engineering Co. Ltd. v. Their Workmen MANU/SC/0210/1964, Workmen of Messrs Firestone Tyre & Rubber Co. of Ind ia (P) Ltd. v. Management and Ors. MANU/SC/0305/1973: (1973) ILLJ 278SC, and Ea stern Electric and Trading Col v. Baldev Lal [1975] Lab. I.C. 1435 (SC) that tho ugh generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not require d to consider the propriety or adequacy of the punishment or whether excessive o r too severe yet an inference of mala fides may in certain cases be drawn from t he imposition of unduly harsh, severe, unconscionable or shockingly disproportio nate punishment; (iv) whether the employer has paid or offered to pay Wages for one month to the employee and (v) whether the employer has simultaneously or wit hin such reasonably short time as to form part of the same transaction applied t o the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial T ribunal would grant: the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffer s from any defect or infirmity, the labour authority will have to find out on it s own assessment of the evidence adduced before it whether there was justificati on for dismissal and if it so finds it will grant approval of the order of dismi

ssal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

In the instant case, a preliminary issue about the domestic enquiry was not taken up separately as there was no insistence for it and the management has adduced evidence on merit as well in addition to its claim on the basis of the domestic enquiry. The evidence led by Shri PC Choudhury, Senior Manager of Kellyden TE as a witness in the FIR stated before the Police in connection with Kaliabor PS Case No.50/96 that the workman had been kept out of job by the authority. Ex-1 dated 04.01.1997 would amply demonstrate that the enquiry proceeded ex-parte though in the later part of the communication dated 04.01.1997 (vide Ext.-1), it has been specifically stated that the above has been read out to Shri 3 Ananta Tanti P.R. No.4433 in a language which he understands and a copy handed to him for which a receipt has been obtained , though admittedly Ext 1 was never served upon the workman. The above facts that a receipt has been obtained from the workman lacks bona fide on the part of the management when none of the notices preceding the dismissal was served personally and therefore, the decision in Lalla Ram (supra) has no application in the instant case.

34. Caltex (India Ltd.) AIR 1957 SC 326 (supra), Sasa Musa Sugar Works, AIR 1959 SC 923 (supra) and State of Rajasthan (2006) 1 SCC 589 (supra) relate to quantum of punishment and the power of the learned Labour Court. In the above cited cases the Apex Court upon relying on the decisions in Atherton West & Co. Ltd. -vs- Suti Mill Mazdoor Union, (1953) SCR 780, Automobile Products of India Ltd. -vs- Rukmaji Bala, (1955) 1 SCR 1241 and Lakshmi Devi Sugar Mills Ltd. -vs- Pt. Ram Sarup, Civil Appeal No. 244 of 1954 has held as thus,

> Industrial Tribunal has no jurisdiction while entertaining an application under Section 33 of the Industrial Disputes Act, 1947, to consider whether the punishment sought to be meted out by the employer to the workman is harsh or excessive. The measure of punishment to be so meted out is within the sole discretion of the employer who is to judge for himself what is the punishment commensurate with the offence which has been proved against the workman. The only jurisdiction which the Industrial Tribunal has under Section 33 is to determine whether a prima facie case for the meeting out of such punishment has been made out by the employer and the employer is not actuated by any mala fides or unfair labour practice or victimization.

There is no dispute over the above proposition of law. The only jurisdiction under Section 33 of the Act is to determine whether a prime facie case has been made out and the action taken is bona fide or not. The learned Labour Court has after taking into consideration of the entire case and the legal evidence led by the parties has held that the authorities appeared to have created circumstances to compel the workman to remain absent so that the action would be taken against him. The learned Labour Court though has observed that dismissal is rather too heavy a punishment which could have been avoided by the management, but in the facts and circumstances of the case, the award of punishment of dismissal loses its significance when there is a finding that the action is not bona fide on the part of the management and there is no prima facie case when there is no notice served on the workman while the proceeding was initiated.

35. Considering the matter in its entirety and the decisions rendered by the Hon’ble Apex Court as well as this Court discussed hereinabove, the Court is not inclined to interfere with the order dated 01.06.1999 passed in Case No.2/1997 by the learned Labour Court and consequently the order of the learned Labour Court is affirmed.

36. Accordingly, the writ petition is dismissed. The parties are left to bea

r their own costs.

37. Registry is directed to send down the records immediately.